

Date: May 19, 1998

IN THE MATTER OF:

Thomas Crespin,
Complainant

Case No. 98-ERA-17

v.

File No. 6-0030-98-801

The Foley Company,
Respondent

**RECOMMENDED DECISION AND ORDER
APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT AND RELEASE
and DISMISSING COMPLAINT WITH PREJUDICE**

This is a proceeding arising under the Energy Reorganization Act, 42 U.S.C. §5851, and its implementing regulations found at 29 C.F.R. Part 24. The parties appeared for hearing of this matter and, after some testimony was received, subsequently informed this Judge of their intention to amicably resolve the matter. The transcript will be forwarded to the Administrative Review Board for inclusion with the administrative file of this matter upon its receipt from the reporting firm. The undersigned is presently in receipt of a Confidential Settlement Agreement and Release, executed by all parties on May 18, 1998.

The Part 24 regulations do not contain any provision relating to a dismissal of a complaint by voluntary settlement. Therefore, it is necessary to refer to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which Rules are controlling in the absence of a specific provision at Part 24.

Part 18.9 allows the parties in a proceeding before an administrative law judge to reach agreement on their own. 29 C.F.R. Part 18.9(a)-(c). The parties must "[n]otify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action." 29 C.F.R. Part 18.9(c)(2). Once such notification occurs, the administrative law judge shall then issue a decision within thirty (30) days if satisfied with the agreement's form and substance. 29 C.F.R. Part 18.9(d).

This Judge must review the Settlement Agreement to determine whether its terms are a fair, adequate and reasonable settlement of the complaint. **Bonanno v. Stone & Webster Engineering Corp.**, 97-ERA-33 (ARB 6/27/97) (Citation Omitted). In the matter **sub judice**, I note that the terms of the settlement agreement encompass the settlement of matters arising under various laws, only one of which is the ERA. **See Generally** para. A(4); para. B(9). For the reasons set forth in **Poulos v. Ambassador Fuel Oil Co., Inc.**,

86-CAA-1 (Sec'y 11/2/87), I have limited my review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegation that Respondent violated the ERA.

Upon careful review, this Judge has reached the determination that the Settlement Agreement and Release fully comports with precedent established by the Secretary and/or Administrative Review Board.

The parties have included language in the agreement to the effect that neither party believes it acted unlawfully and that nothing in the agreement should be construed as an admission of liability. **See** para. 8. This recommended decision and order shall not be construed as indicating my view on the merits of this entire matter.

Paragraphs 10, 11 and 12 of the settlement provide that the parties shall keep the terms of the settlement confidential. I note, however, the parties' effort to bring this confidentiality provision into compliance with applicable case law, such as **McGlynn v. Pulsair Inc.**, 93-CAA-2 (Sec'y 6/28/93), by specifically providing the confidentiality provision does not restrict disclosure where required by law. **See** para. 10. While the liquidated damage provision providing for recourse upon breach of the confidentiality provision may appear, at first blush, to be excessive, this Administrative Law Judge is satisfied with the good intentions of the parties.

In accordance with **Biddy v. Pipeline Service Co.**, 95-TSC-7 (12/3/96), the parties have certified that no other settlement agreements were entered into between the parties. **See** para. 16.

This Judge notes the parties have designated the Settlement Agreement and Release as confidential commercial information, as defined at 29 C.F.R. Part 70.26, and thereby attempt to preclude disclosure pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552. In this regard, **see** Letter dated May 18, 1998, from Attorney Dade on behalf of both parties.

FOIA, however, requires agencies to disclose requested documents unless they are exempt from disclosure. **See Bonanno, supra**, at p. 2; **Klock v. Tennessee Valley Auth.**, 95-ERA-20 (ARB 5/30/96), at p. 2; **Darr v. Precise Hard Chrome**, 95-CAA-6 (Sec'y 5/9/95), at p. 2; **Webb v. Consolidated Edison Co.**, 93-CAA-5 (Sec'y 11/3/93) at p. 2. Since no FOIA request has been made, "it would be premature to determine whether any of the exemptions in FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It would also be inappropriate to decide such questions in this proceeding." **Darr, supra**, at pp. 2-3. **See Also DeBose v. Carolina Power and Light Co.**, 92-ERA-14 (Sec'y 2/7/94), at p. 3. Nevertheless, the Settlement Agreement and Release shall be placed in a portion of the file clearly designated as confidential commercial information which must be handled in accordance with the appropriate procedure for a FOIA request, which procedure is found at 29 C.F.R. Part 70.26. **See Generally Bonanno, supra**, at n. 1.

Accordingly, it is hereby **RECOMMENDED** that the Settlement Agreement and Release between Complainant Crespin and Respondent The Foley Company be **APPROVED** and that the matter be **DISMISSED WITH PREJUDICE**. It is **FURTHER RECOMMENDED** that the Settlement Agreement and Release be designated as confidential commercial information and be handled in accordance with 29 C.F.R. Part 70.26.

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts

DWD:jw

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. **See 29**

C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

